No. 98-996

In the Supreme Court of the United States

OCTOBER TERM, 1998

JANET RENO, ET AL., PETITIONERS

v.

SAUL NAVAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF AUTHORITIES

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1. *Jurisdiction.* Respondents acknowledge (Br. in Opp. 17) that there is a "disagreement" among the courts of appeals on the jurisdictional question presented in this case—namely, whether the district courts have jurisdiction to review challenges to deportation orders under the general federal habeas corpus statute, 28 U.S.C. 2241. That issue is of great importance in the administration of the immigration laws, and the court of appeals decided it incorrectly. As we explain in our certiorari petition (at 19-24), Congress precluded the district courts from exercising habeas corpus jurisdiction to entertain collateral challenges to orders of deportation in four separate ways: (1) by expressly repealing the habeas corpus jurisdiction formerly provided by the Immigration and Nationality Act (INA), 8 U.S.C. 1105a(a)(10) (1994; repealed 1996), in Section 401(e) of the

Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1268 (entitled "ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS"); (2) by replacing that provision with a new Section 1105a(a)(10) that expressly precludes judicial review of deportation orders entered against certain criminal aliens, enacted in Section 440(a) of AEDPA, 110 Stat. 1276-1277; (3) by enacting yet another preclusion of judicial review of such orders entered in transitional cases, in Section 309(c)(4)(G) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-626; and (4) by enacting the sweeping, permanent jurisdiction-limiting provision of 8 U.S.C. 1252(g) (Supp. III 1997), in Section 306(a) of IIRIRA, 110 Stat. 3009-612.

The disagreement on the jurisdictional issue in the lower courts is extensive. The First, Second, and (now) Third Circuits have held that Congress has *not* precluded aliens' access to the district courts to raise collateral challenges to the merits of their deportation orders under 28 U.S.C. 2241;[1] the Ninth Circuit has held that Congress *has* precluded such access, but that that preclusion is unconstitutional;[2] and the Seventh and Eleventh Circuits have held that Congress has eliminated the district courts' jurisdiction to review deportation orders under 28 U.S.C. 2241, and that that preclusion is constitutional.[3] This Court's review is needed to resolve

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[1] See *Goncalves* v. *Reno*, 144 F.3d 110, 122-123 (1st Cir. 1998), petition for cert. pending, No. 98-835 (filed Nov. 18, 1998); *Jean-Baptiste* v. *Reno*, 144 F.3d 212, 218-220 (2d Cir. 1998), petition for reh'g pending (filed July 6, 1998); Pet. App. 13a, 27a-30a (decision below, following *Jean-Baptiste*); *Sandoval* v. *Reno*, Nos. 98-1099, 98-1547, & 98-3214 (3d Cir. Jan. 26, 1999).

[2] See *Magana-Pizano* v. *INS*, 152 F.3d 1213, 1216-1220, amended, 159 F.3d 1217 (9th Cir. 1998), petition for cert. pending, No. 98-836 (filed Nov. 18, 1998).

[3] See *LaGuerre* v. *Reno*, Nos. 98-1954 & 98-2613, 1998 WL 912107, at *4-*5 (7th Cir. Dec. 22, 1998); *Rodriguez* v. *Reno*, No. 98-4426, 1999 WL 1762, at *5-*6 (11th Cir. Jan. 4, 1999); *Richardson* v. *Reno*, No. 98-4230,

the disagreement among the lower courts about the proper forum for such judicial review of deportation orders as remains available after Congress's enactment of AEDPA and IIRIRA. See *Sandoval* v. *Reno*, Nos. 98-1099, 98-1547, & 98-3214 (3d Cir. Jan. 26, 1999), slip op. 11 ("The resulting division among the courts on this important issue leaves the definitive interpretation for resolution by the Supreme Court.").

Respondents advance two arguments in an attempt to minimize this conflict among the circuits. First, they argue (Br. in Opp. 13-14) that the disagreement involves only interim provisions of AEDPA and IIRIRA governing judicial review of orders of deportation involving aliens in proceedings on or before April 1, 1997, the general effective date of IIRIRA, and not orders of removal entered after that date.

1998 WL 889376, at *12-*16, *28-*31 (11th Cir. Dec. 22, 1998). Respondents suggest (Br. in Opp. 20-21 & n.19) that the Eleventh Circuit's decisions in *Rodriguez* and *Richardson* do not conflict with the decision below because *Rodriguez* did not concern a criminal alien barred from seeking review of his removal order in the court of appeals, and *Richardson* did not involve an alien who was subject to a final order of removal. In both cases, however, the court framed the issue before it as whether Section 1252(g) altogether precludes the district courts' habeas corpus jurisdiction over immigration cases under 28 U.S.C. 2241. The Eleventh Circuit in *Richardson* therefore ruled that Section 1252(g) "repeals any statutory jurisdiction over immigration decisions other than that conferred by" Section 1252 itself, including "§ 2241 habeas jurisdiction over immigration decisions by the Attorney General under the INA," 1998 WL 889376, at *13, and also rejected Richardson's contention that such preclusion of review in district court violates the Constitution, *id.* at *28-*29. In *Rodriguez*, the court followed its decision in *Richardson* to rule that Section 1252(g) "repeals district court jurisdiction to issue writs of habeas corpus under § 2241 to aliens challenging their removal from the United States," and that "IIRIRA's repeal of § 2241 is not unconstitutional because IIRIRA does not eliminate all judicial review of immigration matters," but rather creates a "consolidated form of judicial review of proceedings to remove aliens from the United States—a petition for review in the court of appeals." 1999 WL 1762, at *5.

That contention is incorrect. The First, Second, and Third Circuits have held that a *permanent* provision of IIRIRA, Section 1252(g)—which broadly provides that, "notwithstanding any other provision of law, no court shall have jurisdiction" to hear challenges to removal orders except as set forth in Section 1252 itself, see 8 U.S.C. 1252(g) (Supp. III 1997)—has no effect on the district courts' jurisdiction under 28 U.S.C. 2241.[4] See note 1, *supra*. Respondents have offered no reason why district courts in those circuits, bound by those decisions, will not conclude in the future that, despite Section 1252(g), they may exercise jurisdiction to review orders of removal under 28 U.S.C. 2241 at the behest of criminal aliens who are deemed barred by IIRIRA's permanent preclusion of review provision, 8 U.S.C. 1252(a)(2)(C) (Supp. III 1997), from raising claims by petitions for review directly in the courts of appeals.[5]

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[4] See *Goncalves*, 144 F.3d at 122-123; *Jean-Baptiste*, 144 F.3d at 218-220; Pet. App. 29a-30a (relying on *Jean-Baptiste*); *Sandoval*, slip op. at 20-22. Moreover, respondents defend (Br. in Opp. 15-16) this aspect of the court of appeals' decision as a correct application of the presumption against implied repeal of habeas corpus jurisdiction articulated in *Felker* v. *Turpin*, 518 U.S. 651 (1996), and as avoiding constitutional questions about Section 1252(g). As the Eleventh Circuit observed in *Richardson*, however, *Felker* does not support the Second Circuit's construction of Section 1252(g) in the decision below, because the repeal of jurisdiction under Section 1252(g), in contrast to the statute examined in *Felker*, is comprehensive. "Unlike *Felker*, the language of [Section 1252(g)] does not require repeal by implication. Indeed, Congress could hardly have chosen broader language to convey its intent to repeal any and all jurisdiction except that provided by [the INA itself.]" *Richardson*, 1998 WL 889376, at *14. Further, Section 401(e) of AEDPA, entitled "ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS," expressly repealed the provision for habeas corpus review in 8 U.S.C. 1105a(a)(10). Congress thus left nothing to implication. See *Sandoval*, slip op. at 34 (Alito, J., concurring in part and dissenting in part); *LaGuerre*, 1998 WL 912107, at *3.

[5] As we explain in our certiorari petition (at 14-15), respondents Navas and Henderson attempted to advance their claims by filing petitions for

Respondents also argue (Br. in Opp. 17-20) that the conflict among the circuits is limited to the *forum* (court of appeals or district court) in which challenges to deportation orders may be heard, and does not concern the permissible scope, after IIRIRA, of judicial review. That disagreement as to the proper forum in which challenges to deportation orders may be pursued, however, is of fundamental significance to the administration of the Nation's immigration laws. As we have explained (Pet. 21-24; 98-835 Pet. 15-17; 98-836 Pet. 21-25), Congress has long perceived that challenges to deportation orders in district courts carry the potential for considerable delay in deporting aliens, and has therefore consistently channeled judicial review of such orders to the courts of appeals. See also *Stone* v. *INS*, 514 U.S. 386, 399 (1995); *Foti* v. *INS*, 375 U.S. 217, 224 (1963). The court of appeals' decision in this case departs from that consistently expressed congressional preference for review in the courts of appeals (as that court acknowledged, see Pet. App. 30a n.9). Indeed, it turns the congressionally enacted structure for review of immigration decisions upside down, for it

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direct review in the court of appeals. The court of appeals, however, believing itself bound by language in its earlier decisions in *Jean-Baptiste* v. *Reno*, *supra*, and *Hincapie-Nieto* v. *INS*, 92 F.3d 27, 28 (2d Cir. 1996), concluded that Section 309(c)(4)(G) of IIRIRA and Section 440(a) of AEDPA eliminated its jurisdiction to review any of the claims in those petitions for review, including the constitutional claims. See Pet. App. 27a, 30a. We also point out in our certiorari petitions in *Goncalves* (98-835 Pet. 19 n.10, 24 n.15) and *Magana-Pizano* (98-836 Pet. 16-17 n.9, 26) that courts are likely to construe IIRIRA's permanent preclusion of review provision covering criminal aliens, 8 U.S.C. 1252(a)(2)(C) (Supp. III 1997), in conformity with Section 309(c)(4)(G) of IIRIRA and Section 440(a) of AEDPA. Although respondents observe (Br. in Opp. 14-15) that their petitions for review are not governed by the permanent rules of Section 1252(a)(2)(C), they advance no reason to believe that the courts will construe that provision differently than they have construed the earlier, similar provisions restricting judicial review of petitions filed by specific classes of criminal aliens.

permits criminal aliens opportunities for *greater* review (and delay) of their deportation orders by allowing them to proceed as an initial matter in the district court rather than the court of appeals, where all other aliens have been required to proceed—previously under 8 U.S.C. 1105a(a) (1994), and now under 8 U.S.C. 1252(a) (Supp. III 1997).[6] Moreover, administrative and judicial proceedings involving thousands of aliens similarly situated to respondents are still pending in the lower courts and before the Board of Immigration Appeals (see Pet. 23-24), and it is vitally important that the government, those aliens, and the lower courts know where (if anywhere) such cases may be brought. This Court's review of the court of appeals' decision is therefore warranted.[7]

2. *Merits.* Respondents argue (Br. in Opp. 21-22) that the court of appeals correctly rejected the Attorney General's decision in *In re Soriano* (Pet. App. 389a-402a). In *Soriano*, the Attorney General construed Section 440(d) of AEDPA, which bars certain classes of criminal aliens from discretionary relief from deportation under 8 U.S.C. 1182(c) (1994), to apply to all deportation proceedings pending at the time of AEDPA's enactment. In contrast to the decision below, however, the Seventh Circuit has concluded that the Attorney General's decision in *Soriano* is correct. *LaGuerre* v. *Reno*, Nos. 98-1954 & 98-2613, 1998 WL 912107 (Dec. 22,

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[6] See also *LaGuerre*, 1998 WL 912107, at *3 (noting that if IIRIRA were construed as respondents suggest, then "Congress accomplished nothing toward its aim of curtailing judicial review" for criminal aliens, and "[m]aybe less than nothing, if * * * Congress simultaneously opened the door to review by the district courts followed by review by the courts of appeals").

[7] For further discussion of the jurisdictional question presented, we also refer the Court to our petitions and reply briefs in *Goncalves* (98-835 Pet. 14-24; 98-835 Reply Br. 1-6) and *Magana-Pizano* (98-836 Pet. 14-29; 98-836 Reply Br. 1-10).

1998). The Seventh Circuit observed, moreover, that the application of Section 440(d) to pending cases does not implicate the presumption against retroactivity because "[i]t would border on the absurd to argue that these aliens might have decided not to commit [their] crimes, or might have resisted conviction more vigorously, had they known that if they were not only imprisoned but also, when their prison term ended, ordered deported, they could not ask for a discretionary waiver of deportation." *Id.* at *5. Given the conflict of authority on a matter affecting thousands of aliens already in deportation proceedings or pursuing federal-court litigation (see Pet. 24, 26), review of the lower court's decision on the merits is warranted.[8]

According to respondents (Br. in Opp. 24-26), the court of appeals correctly inferred that Section 440(d) of AEDPA does not apply to pending cases from the fact that Congress explicitly provided in AEDPA that other changes to the immigration laws were to be applied to pending cases. But, as we have noted (Pet. 25-26 n.14), the most relevant points of comparison to Section 440(d) are found in Subtitle D of

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[8] Although the Seventh Circuit concluded in *LaGuerre* that the district court had no jurisdiction over the aliens' habeas corpus petitions (see p. 2 & n.3, *supra*), it also noted the possibility that the aliens might be able to raise their claims by petitions for review in the courts of appeals, see *LaGuerre*, 1998 WL 912107, at *4-*5, and it addressed the merits of their contentions "lest [the aliens] feel that [the court has] tripped them up on a technicality" (namely, having filed "in the wrong court under the wrong statute"), *id.* at *4. Even if the *LaGuerre* court's discussion of the merits of the aliens' claims was technically dictum, it will almost surely be followed by subsequent panels of that court, just as the court of appeals in this case believed itself bound by language in *Jean-Baptiste*, arguably dictum, concerning the continued availability (after enactment of IIRIRA) of district court jurisdiction under 28 U.S.C. 2241. See Pet. App. 27a-30a (following *Jean-Baptiste*); *Jean-Baptiste*, 144 F.3d at 220 (stating that "§ 2241 habeas review survives the amendments to the INA enacted by [IIRIRA]"); *ibid.* (observing that aliens in that case had not invoked Section 2241 habeas corpus jurisdiction).

Title IV of AEDPA, which governs "Criminal Alien Procedural Improvements" (110 Stat. 1273), and, specifically, in Section 440 of AEDPA, which governs "Criminal Alien Removal" (110 Stat. 1276). There, Congress expressly provided that Section 440(e) (immediately adjacent to Section 440(d), at issue here)—which expanded the definition of "aggravated felony," conviction of which renders an alien deportable—was to be applied only to *future* immigration cases. See AEDPA § 440(f) (providing that Section 440(e) "shall apply to convictions entered on or after the date of the enactment of this Act," with an exception for AEDPA Section 440(e)(3), referring to convictions for alien smuggling, which was made applicable as if enacted in 1994), 110 Stat. 1278. The most obvious inference to be drawn from that express prospective-only directive is that Section 440(d), which also makes deportation consequences turn on an alien's conviction for a crime but contains no such prospective-only directive, should be applied to pending cases.

Respondents attempt (Br. in Opp. 25) to diminish the impact of Section 440(f) by arguing that it is not a "pure prospectivity provision[.]" In a limited sense Section 440(f) does not make Section 440(e) purely prospective, for under Sections 440(e) and (f) an alien may be deported as an aggravated felon even if his crime was committed before enactment of AEDPA, as long as the conviction was entered after AEDPA's enactment. The principal thrust of Section 440(f), however, is to make clear that Section 440(e) does not make an alien deportable based on his *pre-existing* conviction for a crime newly defined as an aggravated felony. The INA makes an alien's deportability turn on his *conviction* for an aggravated felony, not his *commission* of such a crime. See 8 U.S.C. 1251(a)(2)(A)(iii) (1994); 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. III 1997). Accordingly, Section 440(e) of AEDPA was *expressly* made to apply prospectively based on the event that renders an alien deportable—a criminal conviction for

an aggravated felony—which places it in sharp contrast to Section 440(d) of AEDPA. See also 98-835 Pet. 26-27 (discussing two other prospective-only provisions in AEDPA's criminal alien subtitle that reinforce the conclusion that Section 440(d), which contains no such provision, applies to pending cases).

Respondents argue further (Br. in Opp. 26-28) that, even if the lower court's inferences from the statutory structure and text about the temporal scope of Section 440(d) were unwarranted, it would have been justified in applying the presumption against retroactive applications of federal civil statutes to this case, as the First Circuit did in *Goncalves* v. *Reno*, 144 F.3d 110, 128 (1998), petition for cert. pending, No. 98-835 (filed Nov. 18, 1998). But see *LaGuerre*, 1998 WL 912107, at *5 (stating that "[i]t would border on the absurd" to apply the presumption against retroactivity in this situation). That is incorrect, for the application of Section 440(d) to pending cases would not be retroactive. As the Attorney General concluded in her decision in *Soriano*, Section 440(d) divested her of the power to grant prospective relief from deportation (see Pet. App. 395a-397a); it is thus akin to a statute withdrawing jurisdiction, or altering the terms of permissible injunctive relief *in futuro*. "[T]he relevant activity that the rule regulates," *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 291 (1994) (Scalia, J., concurring in the judgment), is the Attorney General's authority to grant relief from deportation under Section 1182(c), not the alien's criminal conduct or conviction.[9]

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[9] Respondents also submit (Br. in Opp. 28) that the decision below avoids constitutional questions raised by the application of Section 440(d) to pending cases. As we note in our reply brief in *Goncalves* (98-835 Reply Br. 9-10 n.8), the Seventh Circuit has already addressed and rejected some of those constitutional claims in *LaGuerre*, and it is unlikely that the courts of appeals will be able to avoid reaching the constitutional questions entirely. For further discussion of the merits, we refer the Court to our

3. *Proper Case For Complete Review.* Finally, respondents submit (Br. in Opp. 29-30) that if the Court does grant certiorari in one of the pending cases arising out of the application of Section 440(d) of AEDPA, it should grant plenary review in this case, rather than holding it for *Reno* v. *Goncalves*, No. 98-835, or *INS* v. *Magana-Pizano*, No. 98-836. We agree, for the reasons set forth in our response to the conditional cross-petition for a writ of certiorari in this case (No. 98-1160, at 4-6). Now that respondents Navas and Henderson have filed a cross-petition seeking review of the court of appeals' dismissal of their petition for review, the Court could decide both whether Section 309(c)(4)(G) of IIRIRA and Section 440(a) of AEDPA prevented the court of appeals from taking jurisdiction over the various claims in their petitions for review, and whether the district court had jurisdiction over the similar claims raised in Navas's petition for habeas corpus under 28 U.S.C. 2241. In addition, plenary review over the petition and cross-petition in this case would also ensure that the Court could resolve the reasonableness of the Attorney General's decision in *Soriano*, should the Court reject our submission (see 98-996 Pet. 23) that neither the district court nor the court of appeals had jurisdiction to review respondents' challenge to the Attorney General's denial of discretionary relief based on *Soriano*.

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For the foregoing reasons, and for those set forth in the petition, the petition for a writ of certiorari should be granted.

SETH P. WAXMAN
Solicitor General

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petition and reply brief in *Goncalves* (98-835 Pet. 24-29; 98-835 Reply Br. 6-9).